

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

KELLY WHALEN, et al.,  
Plaintiffs,  
v.  
FACEBOOK, INC.,  
Defendant.

Case No. 20-cv-06361-JST

**ORDER INVITING SUPPLEMENTAL  
BRIEFING RE: MOTION TO COMPEL  
ARBITRATION**

Re: ECF No. 45

Before the Court is Defendant Facebook, Inc.'s motion to compel arbitration. ECF No. 45. The parties engaged in discovery after Facebook filed its motion. During that process, Facebook learned that Plaintiff S.M. created a second Instagram account and now contends that she agreed to arbitration as part of that sign-up process. ECF No. 87 at 8-10. Plaintiffs have not had an opportunity to respond to that argument or the evidence submitted in support. Nor have Plaintiffs had an opportunity to respond to other evidence submitted by Facebook with its reply, including evidence that Facebook contends supports a finding that Plaintiffs agreed to arbitration by continuing to use Instagram after the terms of use were updated in 2020.<sup>1</sup> *See, e.g., id.* at 11 (citing Exhibits 5-6 to the Duffey Supplemental Declaration and Exhibit 5 to the Provance Supplemental Declaration); *id.* at 13 (citing Exhibits 9-11 to the Provance Supplemental Declaration).

Plaintiffs are invited to file a supplemental brief responding to the evidence presented with Facebook's reply on or before October 1, 2021. If they file a supplemental brief, Facebook may

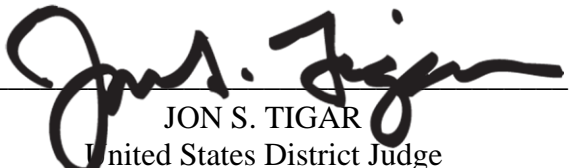
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<sup>1</sup> Some, but not all, of this evidence was in Facebook's possession, and it appears that Facebook could have submitted it with its moving papers. While the Court might ordinarily decline to consider such evidence, it will do so in this instance given its potential materiality.

1 file its own supplemental brief in response on or before October 15, 2021. The matter will then be  
2 deemed submitted on the papers unless otherwise ordered.

3 **IT IS SO ORDERED.**

4 Dated: September 21, 2021

5   
6 JON S. TIGAR  
United States District Judge

United States District Court  
Northern District of California